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February 10, 2000

BY HAND DELIVERY
Magalie R. Salas, Esquire
Secretary
Federal Communications Commission
Room TW-B204
445 12th Street, S.W.
Washington, DC 20554

Re: Establishment of a Class A Television Service
MM Docket No. 00-10/MM Docket No. 99-292
RM-9260

Dear Ms. Salas:

Transmitted herewith on behalf of Pappas Telecasting Companies are an original and six (6) copies of its Comments in the above-referenced rulemaking proceeding concerning the Commission's proposal to establish a Class A television service for qualified LPTV stations.

Should any questions arise concerning this matter, please communicate directly with this office.

Very truly yours,
FLETCHER, HEALD & HILDRETH, P.L.C.

Andrew S. Kersting
Counsel for Pappas Telecasting Companies

Enclosure
cc (w/ encl.): Certificate of Service (by hand)

0+6

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	MM Docket No. 00-10
Establishment of a Class A	)	MM Docket No. 99-292
Television Service	)	RM-9260

To: The Commission

COMMENTS OF PAPPAS TELECASTING COMPANIES

PAPPAS TELECASTING COMPANIES

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SUMMARY

In response to Congress' enactment of the Community Broadcasters Protection Act of 1999 (the "CBPA"), the FCC issued an *Order and Notice of Proposed Rule Making*, FCC 00-16 (released January 13, 2000), requesting comments concerning its various proposals to implement the new legislation. As one of its proposals, the FCC tentatively proposed that it will not require Class A applications to protect pending applications for new full-service television stations, many of which have been pending at the Commission for several years.

As demonstrated herein, in promulgating rules to implement the CBPA, the Commission should interpret the new legislation in a manner that will avoid raising constitutional questions, and adopt rules that are consistent with the Communications Act as a whole as well as the FCC's longstanding regulatory framework. Therefore, in implementing Section 336(f)(7)(A) of the Act, the FCC should require Class A applications to protect pending applications for new full-service television stations. Requiring such protection would serve the public interest by promoting the Commission's fundamental objectives of fostering competition and creating additional opportunities for increased ownership diversity, which the new full-service stations would provide. Interpreting the statute in this manner also would promote the emergence of new broadcast networks because it would provide additional full-service broadcast stations with which new networks could establish primary affiliations, and thereby enhance their distribution.

Moreover, in connection with the FCC's September 28, 1999, Closed Broadcast Auction, the Commission required the winning bidders to make substantial down payments to the federal treasury in order to preserve their right to obtain a construction permit for their proposed new full-power stations. If the Commission now were to require Class A applications to protect only "authorized"

full-power stations, and the winning bidders' applications are ultimately dismissed because of a conflict with a subsequently-filed Class A application, the Commission's acceptance of the winning bidders' down payments without the corresponding issuance of a construction permit for their proposed facility would raise a significant question as to whether the Commission's action constituted an unlawful "taking" in violation of the due process clause of the Fifth Amendment.

Furthermore, the Commission's proposed interpretation of Section 336(f)(7)(A) of the Act would result in an inconsistency between the treatment of pending applications for new full-service television stations, and applications for LPTV and TV translator stations. Under the Commission's proposal, pending applications for full-power stations would not be entitled to protection from Class A applications, despite their primary service status. Conversely, LPTV and TV translator applications, including those which are not even eligible for Class A status, would be entitled to protection from Class A applications even though they have always operated, and will continue to operate, on a secondary basis.

In addition, the Commission's proposal would be grossly inequitable due to the disparate treatment that applications for full-service stations and LPTV and TV translator applications received during the DTV "freeze." The Commission's proposal not to require Class A applications to protect pending applications for new full-service stations also would result in an inconsistency between Sections 336(f)(7)(A) and 307(b) of the Act. Indeed, many of the pending full-power applications would promote the objectives of Section 307(b) because they propose to bring a first local television service to the designated community.

In light of the significant constitutional question, the gross inequities, and the numerous inconsistencies outlined above that would result from the Commission's proposed interpretation of

the CBPA, the Commission should interpret the phrase "transmitting in analog format" contained in Section 336(f)(7)(A) of the Act as describing only the nature of the service which is entitled to protection (*i.e.*, analog), rather than the status of the station's existing operation (*i.e.*, pending application, authorized or operating station).

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	MM Docket No. 00-10
Establishment of a Class A	)	MM Docket No. 99-292
Television Service	)	RM-9260

To: The Commission

COMMENTS OF PAPPAS TELECASTING COMPANIES

Pappas Telecasting Companies ("Pappas"),[1] by its attorneys, hereby submits these comments in response to the *Order and Notice of Proposed Rulemaking*, FCC 00-16 (released January 13, 2000) ("*NPRM*"), in the above-captioned proceeding. Pappas respectfully submits that it can provide the Commission with a unique perspective concerning the issues raised in this proceeding because it not only holds FCC authorizations for both full-service and low power television ("LPTV") stations, but it also has numerous applications pending before the Commission for new full-service NTSC stations. As the Commission adopts new rules to implement the Community Broadcasters Protection Act of 1999 (the "CBPA"),[2] which was signed into law on November 29, 1999, Pappas respectfully requests that the Commission consider the significant impact its new rules will have on the licensing of the last full-service NTSC stations, especially those which would provide a community with its first local television service.

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[1] Pappas Telecasting Companies and its affiliated entities (collectively referred to herein as "Pappas") have nearly 30 years of experience owning and operating full-service television broadcast stations.

[2] Section 5008 of Pub. L. No. 106-113, 113 Stat. 1501 (1999), Appendix I, *codified at* 47 U.S.C. §336(f).

I. Introduction.

Pappas, through its affiliated entities, currently is the licensee or permittee of 15 full-power television stations, and operates three additional full-power stations pursuant to local marketing agreements ("LMAs"). In addition, Pappas currently has 13 applications for new full-service NTSC stations pending before the Commission which were filed in July 1996, including ten of which would provide the designated community with its first local television service.[3] Eleven of the pending NTSC applications specify a community of license which is located within a DTV "freeze area."[4] Three of the pending applications specify a channel between channels 60-69, including one which is the surviving applicant in a settlement proposal which has been pending before the Commission since January 28, 1998.

In addition to its full-service television stations and pending NTSC applications, Pappas also is the licensee or permittee of 11 LPTV stations, and operates three additional LPTV stations pursuant to LMAs. Pappas filed statements of eligibility seeking Class A status for each of its LPTV stations. Therefore, as the owner and/or operator of a significant number of LPTV stations, Pappas has every incentive to have the Commission adopt rules in implementing the CBPA that will enable its qualified LPTV stations to obtain Class A status in the most expedient manner possible, and with the least amount of disruption to the current operation of those stations. Pappas recognizes, however, that there are significant public interest issues at stake in this rulemaking proceeding.

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[3] Six of these applications were accompanied by a rulemaking petition which requested the allotment of a new NTSC channel. None of these rulemaking petitions have been acted on by the Commission.

[4] *See Advanced Television Systems and Their Impact on the Existing Television Broadcast Service*, RM-5811, 1987 FCC LEXIS 3477 (July 17, 1987), 52 Fed.Reg. 28346 (1987) ("*Freeze Order*").

Indeed, the Commission's action will have a significant and far-reaching effect on the licensing of the last full-service NTSC television stations, and, as a result, the public interest benefits that ultimately may be achieved through their transition to digital service.

II. Class A Applications Should Be Required to Protect Pending Proposals for New NTSC Stations.

The CBPA provides for the establishment of a new primary service, "Class A" license for qualifying LPTV stations. The CBPA amended Section 336(f) of the Communications Act of 1934, as amended (the "Act"), to provide that the FCC may not grant a Class A license (nor approve a modification of a Class A license) unless the applicant demonstrates, *inter alia*, that the proposed Class A station will not cause interference to the predicted Grade B contour "of any television station transmitting in analog format . . . ."[5]

In the *NPRM*, the FCC specifically requested comment on how it should interpret the phrase, "transmitting in analog format," contained in Section 336(f)(7)(A) of the Act.[6] The Commission proposed to require Class A stations to protect only those full-service NTSC stations actually transmitting or authorized to transmit in analog format (*i.e.*, NTSC stations which hold either a license or construction permit). Thus, the Commission proposed not to require Class A stations to protect pending NTSC applications or allotment rulemaking petitions, or modified allotment proposals for channel or other technical changes, including modification applications filed after November 29, 1999. *Id.* The FCC acknowledged, however, that there are still applications and allotment rulemaking petitions pending before the Commission involving channels 60-69 and

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[5] 47 U.S.C. §336(f)(7)(A).

[6] *NPRM*, ¶27.

requests for waiver of the 1987 DTV *Freeze Order* which, together, account for approximately 180 potential new NTSC stations. *Id.* at ¶28. Some of these applications have been on file with the FCC for over ten years. Although these pending applications are entitled to protection from full-service analog modification applications,[7] they would not be protected from Class A applications under the Commission's proposed interpretation of the CBPA. *Id.* The Commission also noted that the CBPA requires Class A applications to protect LPTV and TV translator applications filed prior to the date on which a Class A application is filed.[8] For the reasons stated below, the Commission should interpret Section 336(f)(7)(A) of the Act to require Class A applications to protect the predicted Grade B contour specified in pending applications and allotment rulemaking petitions proposing new NTSC stations.[9]

A. The Commission's Proposed Interpretation of Section 336(f)(7)(A) of the Act Could Result in an Unconstitutional "Taking".

On September 28, 1999, the Commission held a "Closed Broadcast Auction" during which it auctioned construction permits for new broadcast facilities to mutually exclusive applicants. Prior to the auction, on July 9, 1999, the Commission released a public notice announcing the procedures

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[7] As stated above, the deadline for filing applications for new NTSC stations was September 20, 1996. *See Sixth Report and Order*, ¶104, n. 173.

[8] *NPRM*, ¶27, citing 47 U.S.C. §336(f)(7)(B).

[9] In its initial *Notice of Proposed Rule Making*, FCC 99-257 (released September 29, 1999) ("*Initial Notice*"), the Commission acknowledged that the pending applications and rulemaking petitions could result in as many as 250 new NTSC stations. *Initial Notice*, ¶35.

and minimum opening bids for the upcoming auction, which contained the following "due diligence" disclaimer:[10]

> Potential bidders are solely responsible for investigating and evaluating all technical and marketplace factors that may have a bearing on the value of the facilities on which they intend to bid. *The FCC makes no representations or warranties about the use of this spectrum for particular services. Applicants should be aware that an FCC auction represents an opportunity to become an FCC permittee in these services, subject to certain conditions and regulations. An FCC auction does not constitute an endorsement by the FCC of any particular services, technologies or products, nor does an FCC construction permit or license constitute a guarantee of business success.* Applicants should perform their individual due diligence before proceeding as they would with any new business venture.

Id. at 4 (emphasis in original). The Commission's disclosure statement did not provide any indication, however, that with respect to pending applications for new full-service television stations, even after an applicant's submission of a winning bid and making a down payment sufficient to bring the applicant's total deposit with the government to 20% of its net winning bid, the winning bidder's application might ultimately be subject to dismissal in the event it conflicts with a subsequently-filed Class A application for an LPTV or TV translator station.[11]

Following its September 28, 1999, public auction, the Commission issued a public notice announcing that the long-form applications of 12 winning auction bidders for new full-power

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[10] *See Public Notice*, DA 99-1346 (released July 9, 1999) ("Closed Broadcast Auction; Notice and Filing Requirements for Auction of AM, FM, TV, LPTV, and FM and TV Translator Construction Permits Scheduled for September 28, 1999"), at 4.

[11] On February 8, 2000, the FCC issued a public notice announcing that over 1,600 LPTV stations had filed statements of eligibility for Class A status. *See Public Notice*, No. 97659 (released February 8, 2000) ("Statements of Eligibility for Class A Low Power Television Station Status Tendered for Filing"), Attachment A.

television stations ("Winning Bidders") had been accepted for filing.[12] Each of the Winning Bidders submitted their requisite down payment(s) within ten days of the close of the auction in order to secure their position as the successful high-bidder with respect to their pending application(s).[13] The applications of these Winning Bidders have not yet been granted, nor have any construction permits been issued for the proposed full-power facilities.

The Commission's September 28, 1999, Closed Broadcast Auction constitutes a contractual arrangement between the Winning Bidders and the federal government. The Winning Bidders already have paid substantial sums of money to the government, and are obligated to pay the remaining 80% of their winning bids in order to obtain a grant of their respective applications and a construction permit for their proposed new full-service television stations. If the FCC were to interpret Section 336(f)(7)(A) of the Act not to require subsequently-filed Class A applications to protect the pending applications of the Winning Bidders, and the Winning Bidders do not receive an FCC authorization for their respective station(s) prior to the filing of the Class A applications, the Commission's interpretation of Section 336(f)(7)(A) could result in a "taking" in violation of the due process clause of the Fifth Amendment.[14] Therefore, in interpreting Section 336(f)(7)(A) of the Act,

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[12] *See Public Notice*, DA 99-2709 (released December 3, 1999) ("Closed Broadcast Auction Winning Bidder Applications Accepted For Filing - Auction No. 25"), Attachment A.

[13] The aggregate amount of these down payments was over $3.7 million. Winstar Broadcasting Corp. alone paid the federal government $2,201,600 in down payments for its five (5) winning net bids. *See Public Notice*, DA 99-2153 (released October 12, 1999) ("Closed Broadcast Auction No. 25 Closes"), Attachment A, p. 1.

[14] *See United States v. Winstar Corp.*, 518 U.S. 839 (1996); *The Binghampton Bridge*, 70 U.S. 51, 74 (1865). In *Winstar*, the Court concluded that the U.S. government was liable for breach of contract when a Federal statute and implementing regulations invalidated a provision in existing agreements between thrifts and bank regulatory authorities which permitted thrifts to

(continued...)

the Commission should construe the phrase "transmitting in analog format" as describing only the nature of the service which is entitled to protection (*i.e.*, analog), and not the status of the station's existing operation (*i.e.*, pending application, authorized or operating station). By interpreting the new legislation in this manner, the Commission could safely avoid raising a significant constitutional question involving the "takings clause."[15]

Moreover, if the Commission were to interpret Section 336(f)(7)(A) in the manner proposed and cause the Winning Bidders to forfeit their respective down payments without being awarded a construction permit for the facilities proposed in their pending applications, the Commission's action undoubtedly would have a significant chilling effect on the bid amounts in any future FCC auctions. Indeed, potential bidders will be reluctant to bid a significant amount for an FCC authorization if they know that they may never obtain a construction permit even if they are the winning bidder at the public auction.

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[14](...continued)
count supervisory goodwill and capital credits toward their regulatory capital requirements. Similarly, in *Binghampton Bridge*, the Court held that a state breached an express statutory provision conferring geographical exclusivity on a bridge builder when the state subsequently permitted another bridge builder to construct a bridge in violation of the first bridge builder's exclusive rights. *See also Wells Fargo Bank v. U.S.*, 88 F.3d 1012, 1018 (Fed. Cir. 1996).

[15] *See United States v. Security Industrial Bank*, 459 U.S. 70, 82 (1982) (Court declined to construe a statute in a manner that would require it to resolve difficult questions arising under the "takings clause"); *Roth v. Pritikin*, 710 F.2d 934 (2d Cir. 1983) (in the absence of a clear congressional mandate to the contrary, the court construed a statute in such a manner to avoid "[e]ven the spectre of a constitutional issue concerning the proper application of the 'takings clause'"). *See also Branch v. FCC*, 824 F.2d 37, 47 (D.C. Cir. 1987) (noting that an administrative agency properly may be influenced by constitutional considerations in interpreting or applying a statute).

B. It Would Constitute a Grave Injustice Not to Require Class A Applications to Protect Pending NTSC Proposals.

Pappas welcomes the establishment of a Class A license and concomitant "primary service" status that Congress has granted to qualifying LPTV stations. At the same time, however, Pappas recognizes that the FCC has repeatedly stated that it would seek to accommodate pending applications and rulemaking petitions for new NTSC stations.[16] In doing so, the Commission acknowledged that new NTSC service would promote two of its fundamental objectives by fostering competition and creating opportunities for increased broadcast diversity.[17] In addition, the commencement of new NTSC service also would promote the emergence of new networks such as The WB Television Network, UPN, and PaxNet by providing them with additional broadcast outlets to air their programming and thereby enhance their distribution.

In the *Initial Notice*, the Commission stated that, based upon its experience in developing the DTV allotment table, "it may be difficult, if not impossible, for many NTSC applicants and petitioners to find replacement channels" for their pending proposals consistent with the Commission's interference protection requirements.[18] The ability of these NTSC proponents [19] to

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[16] *See, e.g., Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, Second Memorandum Opinion and Order on Reconsideration of the Fifth and Sixth Report and Orders*, FCC 99-257, ¶41 (1998). *See also Reallocation of Television Channels 60-69, the 746-806 MHZ Band, Report and Order*, 12 FCC Rcd 22953 (1998) ("*Channels 60-69 R&O*"); *Public Notice*, DA 99-2605 (released November 22, 1999) ("Mass Media Bureau Announces Window Filing Opportunity For Certain Pending Applications and Allotment Petitions for New Analog TV Stations") ("*Window Filing Notice*").

[17] *See Initial Notice*, ¶36, citing *Channels 60-69 R&O*, 12 FCC Rcd at 22971, ¶40.

[18] *Initial Notice*, ¶37.

[19] For ease of reference, unless a distinction is otherwise warranted, the pending NTSC (continued...)

modify their proposals to eliminate technical conflicts with DTV stations[20] and move from channels 60-69 will be made even more difficult due to the Commission's requirement that these pending NTSC proposals meet the minimum distance separation requirements, and protect DTV stations as required by the Commission's rules, without any allowance for *de minimis* interference.[21] The Commission's refusal to permit NTSC proponents to cause even *de minimis* interference to NTSC or DTV stations will significantly hinder the ability of these proponents to amend or modify their pending NTSC proposals to eliminate interference conflicts and/or move from channels 60-69. The ability of these NTSC proponents to amend or modify their pending proposals would be made even more difficult if they were required to protect future Class A applications.

LPTV stations have always received protection that is secondary to that afforded to full-service stations.[22] As the Commission stated in its rulemaking proceeding establishing the LPTV service, it is a "fundamental principle" that "low power television stations, like television translators,

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[19](...continued)
applicants and rulemaking petitioners will be collectively referred to herein as "NTSC proponents."

[20] The Commission defined "DTV stations" in this context to include "DTV allotments, authorized or requested increases in DTV allotment facilities, and proposals for new or modified DTV allotments." *Window Filing Notice*, p. 1.

[21] *See Window Filing Notice*, pp. 3, 5.

[22] *See, e.g., Low Power Television and Television Translator Service*, MM Docket No. 86-286, 1986 FCC LEXIS 3075, ¶18 (1986) (Notice of Proposed Rulemaking) ("Television translators have always been considered secondary to full service television stations in spectrum priority. This secondary status was continued when the low power television service was instituted.").

should enjoy only a secondary status."[23] Thus, LPTV stations and TV translators have always known that they were authorized on a secondary basis, and were subject to displacement at any time.

In July 1987, the Commission initiated the DTV proceeding and ordered a freeze on new analog TV allotments which temporarily fixed the Television Table of Allotments for 30 designated television markets and their surrounding areas.[24] The Commission adopted its *Freeze Order* in order to "preserve sufficient broadcast spectrum to insure reasonable options relating to spectrum issues for . . . new technologies."[25] In instituting the freeze, the Commission recognized that, due to their secondary status, LPTV and translator stations would not hinder future spectrum use, and expressly excluded them from the freeze:

> This freeze will not apply to low power television (LPTV) and television translator applications. . . . These constitute a secondary service and pursuant to present rules are subject to displacement by a primary service. Therefore, LPTV and TV translator grants will not restrict Commission options.[26]

The Commission repeatedly reaffirmed and relied upon the secondary status of LPTV stations and translators throughout the DTV proceeding.[27] Indeed, the FCC stated that "the low power television service was established for the specific purpose of supplementing conventional

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[23] *Future Role of Low Power Television Broadcasting and Television Translator Service*, BC Docket No. 78-253, 82 FCC 2d 47, 54-55 (1980) (Notice of Proposed Rule Making).

[24] *See Freeze Order*, 52 Fed.Reg. 28346 (1987).

[25] *Id.*, ¶2.

[26] *Id.*, ¶3, n.4.

[27] *See, e.g., Memorandum Opinion and Order on Reconsideration of the Sixth Report and Order*, MM Docket No. 87-268, 13 FCC Rcd 7418, 7461-62 ¶106 (1998); *Sixth Report and Order*, 12 FCC Rcd 14588, 14652 (1997); *Second Report and Order/Further Notice of Proposed Rulemaking*, MM Docket No. 87-268, 7 FCC Rcd 3340, ¶¶39-41 (1992).

broadcast station coverage."[28] Accordingly, based on the secondary status of LPTV and TV translator stations, and the lack of sufficient available spectrum, the Commission refused to include LPTVs and translators in the initial class of eligible DTV stations.[29]

As demonstrated above, LPTV and translator stations (including those of Pappas) continued to be licensed throughout the DTV "freeze" due to their secondary status. Indeed, the secondary nature of LPTV service is the very basis upon which many "qualified LPTV stations" obtained their existing authorization. LPTV licensees have used the "secondary" nature of their service to commence operation, remain on the air, and enhance their respective facilities throughout the DTV proceeding, while, at the same time, many NTSC proponents have not had their proposals acted upon by the Commission due to the DTV freeze. As a result of this disparate treatment during the freeze, it would be grossly inequitable not to require qualified LPTV stations to protect the pending NTSC proposals of those proponents who have been precluded from receiving an NTSC license as well as an initial paired DTV channel assignment during the DTV freeze because they proposed a primary service. Requiring pending NTSC proposals to protect Class A applications would be especially egregious because the NTSC proposals have been pending at the Commission for a minimum of three and one-half years, if not substantially longer.

Moreover, as stated above, Section 336(f)(7)(B) of the Act requires Class A applications to protect authorized LPTV and TV translator stations, as well as pending applications for such facilities. As noted above, LPTV and TV translator stations have always been secondary services

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[28] *Second Report and Order*, MM Docket No. 87-268, 7 FCC Rcd 3340, 3351 (1992) (emphasis added).

[29] *Id.*

subject to displacement at any time. It would be entirely inconsistent with the Commission's longstanding regulatory framework to adopt the Commission's proposed interpretation of Section 336(f)(7)(A) of the Act and require Class A applications to protect pending applications for LPTV and TV translator stations, but, at the same time, not require Class A applications to protect pending applications for full-service stations, including those which propose to bring a first local service (and likely a new network service) to the designated community. The Commission's proposed interpretation would become even more egregious where a TV translator application, which is entitled to protection, is filed only days before a conflicting Class A application, while the pending NTSC applications, which have been held hostage to the DTV freeze, were filed years ago, long before the CBPA was enacted.

Furthermore, the Commission must protect those pending NTSC proposals which propose to bring a first local television service to the designated community. As stated above, of Pappas' 13 applications for new full-service NTSC stations which have been pending before the Commission since July 1996, ten of them propose to bring a first local television service to the designated community of license. Requiring Class A applications to protect those pending NTSC proposals which propose a first local service would promote the objectives of Section 307(b) of the Communications Act of providing a fair, efficient and equitable distribution of full-service television broadcast stations among the various states and communities.[30] It is well established that "full-

[30] 47 U.S.C. §307(b). *See National Broadcasting Co. v. U.S.*, 319 U.S. 190, 217 (1943) (describing a goal of the Communications Act to "secure the maximum benefits of radio to all the people of the United States"); *FCC v. Allentown Broadcasting Co.*, 349 U.S. 358, 359-62 (1955) (describing goal of Section 307(b) to "secure local means of expression").

service stations, by definition, can reach larger audiences than the low power television stations."[31] Further, there are likely to be many instances where potential viewers who reside within the predicted Grade B contour of a proposed full-service facility will not be able to receive the signal of a conflicting Class A station. Therefore, if a community is proposed to be served by both a Class A applicant and a full-power station, consistent with Section 307(b) of the Act, the full-service facility should be preferred because it would provide a more efficient use of scarce spectrum and substantially greater public interest benefits.

In addition, protecting first local service NTSC proposals not only would promote the second television allotment priority of providing each community with at least one television broadcast station,[32] it also would provide an opportunity for emerging networks to enhance their national audience reach by gaining an additional primary affiliate.

The CBPA does not require that Class A applications receive protection from earlier-filed NTSC proposals. In light of: (i) the difficulty that many NTSC proponents already will face in attempting to find a replacement channel for their pending proposals; (ii) the disparate and inequitable treatment of LPTV and TV translator applications *vis-a-vis* full-service NTSC proposals during the DTV "freeze," which was in effect for over 12 years; (iii) the inherent inconsistency that would result in requiring Class A applications to protect all pending LPTV and TV translator applications (including those which are not qualified for a Class A license), but not pending proposals for new full-service stations; and (iv) the inconsistency that would result between the

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[31] *Memorandum Opinion and Order of the Third Report and Order*, MM Docket No. 87-268, 7 FCC Rcd 6924, 6953 (1992), citing *Memorandum Opinion and Order of the Second Report and Order*, MM Docket No. 87-268, 7 FCC Rcd 3340, 3350-52 (1992).

[32] *See Sixth Report and Order* in Docket Nos. 8736 and 8975, 41 FCC 148, 167 (1952).

Commission's proposal to require NTSC proposals to protect Class A applications and the longstanding objectives of Section 307(b) of the Act; the Commission, in interpreting Section 336(f)(7)(A) of the Act, should require Class A applications to protect pending NTSC proposals (*i.e.*, applications and allotment rulemaking petitions for new NTSC stations).

III. Class A Protection for DTV Stations.

The FCC should adopt its proposal not to permit Class A stations to cause *de minimis* levels of interference to DTV service, other than a 0.5% rounding allowance, which is consistent with that afforded to NTSC modification proposals.[33]

With respect to the "maximization" of DTV facilities, "maximization" should be construed as encompassing not only DTV stations seeking to increase their power and/or antenna height above their allotted values, but also stations which seek to extend their service area beyond the NTSC replicated area by relocating their DTV stations from their allotted transmitter site to a new site. Consistent with its proposal, the Commission should require Class A applicants to protect all full-service stations seeking to replicate or maximize their DTV power regardless of the existence of any "technical problems," as referenced in Section 336(f)(1)(D) of the Act. Indeed, the CBPA makes clear that it is intended to "ensure replication" of a full-power station's service area and "permit maximization" of that service as provided for in the Commission's rules.[34]

DTV stations that wish to revert to their analog channel at the end of the transition period should be permitted to do so. They should not be required to file maximization applications on their analog channels by the May 1, 2000, deadline. Instead, the intent to maximize their existing DTV

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[33] *See NPRM*, ¶30.

[34] *See* 47 U.S.C. §336(f)(1)(D).

allotments also should be construed as an intent to maximize their DTV facility on their analog channel at the end of the transition period. DTV stations that wish to revert to operating on their existing analog channel at the end of the transition period should be required to file a maximization application within 30 days after the end of the transition, and should not be required to protect any Class A stations.

For those full-power stations whose DTV and NTSC channels are both outside the core (*i.e.*, above Channel 51), the statutory deadline for filing a notice of intent to maximize their DTV facility should apply, but these DTV stations should not be required to file a maximization application for their in-core channel (which is entitled to protection from Class A service) until 30 days after they have been allotted a DTV channel inside the core spectrum.

IV. The FCC Should Apply Strict Eligibility Requirements In Implementing the Statutory Eligibility Criteria Set Forth in the CBPA.

Section 336(f)(1)(C) of the Act (as amended by the CBPA) provides that a qualified LPTV station has 30 days after final regulations implementing the CBPA are adopted by the Commission in which to submit an application for a Class A license. Section 336(f)(2)(A) of the Act provides that Class A licenses are available only to those LPTV stations which met the qualifying criteria contained therein on a continuous basis during the 90-day period preceding the enactment of the CBPA (*i.e.*, August 31, 1999, through November 29, 1999). Subsection (B) of the above provision states, however, that the Commission may, in its discretion, determine that the public interest would be served by treating an otherwise ineligible LPTV station as a "qualifying low-power television station for purposes of this section . . . ."[35]

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[35] 47 U.S.C. §336(f)(2)(B).

A. One-Time Filing Period.

In the *NPRM*, the FCC acknowledged that the CBPA provides that licensees have 30 days after final regulations implementing the CBPA are adopted in which to file a Class A application.[36] According to the Commission, however, it is unclear whether qualified LPTV stations must apply for a Class A license within the time period prescribed by the CBPA, or whether the FCC may continue to accept applications from LPTV stations to convert to Class A status in the future. In the event the FCC has such authority, the Commission asked whether, "as a matter of policy," it should continue to permit LPTV stations to convert to Class A status after the time frame established by the Act expires.[37]

The FCC previously recognized that there are practical limits on the number of LPTV stations that may become Class A stations, and that there simply is not sufficient spectrum available to grant primary status to all of the operating LPTV stations.[38] The Commission also has stated that it will be difficult, if not impossible, for all of the pending NTSC proponents to amend or modify their existing proposals to eliminate interference conflicts due to the allotment of DTV channels and the reallocation of channels 60-69 to public safety and other uses.[39] If the Commission elects to adopt its tentative proposal and require pending NTSC proposals to protect Class A applications, permitting additional LPTV stations to convert to Class A status after the statutory filing period would make it that much more difficult for pending NTSC proponents to find a suitable replacement

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[36] *NPRM*, ¶8.

[37] *Id.*, ¶9.

[38] *Initial Notice*, ¶46.

[39] *Id.*, ¶37.

channel. Therefore, in implementing Section 336(f)(1)(C) of the Act, the Commission should permit LPTV stations to file an application to convert to Class A status only "within 30 days after final regulations are adopted" to implement the CBPA.[40] To the extent the Commission determines that Section 336(f)(2)(B) of the Act effects its ability to accept Class A applications filed outside the statutory time period, the Commission should accept requests to convert to Class A status under subsection (f)(2)(B) only under the most exceptional and compelling circumstances.[41]

B. Specific Eligibility Criteria.

In order to be a "qualifying" LPTV station, the CBPA requires, *inter alia*, that for the 90-day period preceding the enactment of the new legislation, the LPTV station broadcast (i) a minimum of 18 hours per day, and (ii) an average of at least three (3) hours per week of local programming.[42]

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[40] 47 U.S.C. §336(f)(1)(C).

[41] The express statutory restriction of limiting Class A eligibility only to those qualified LPTV stations which met the statutory eligibility criteria during the 90-day period prior to the enactment of the CBPA is consistent with the Community Broadcasters Association's ("CBA's") rulemaking petition which proposed that conversion to Class A status would be a one-time event. *See* CBA's Amendment to Petition for Rulemaking, filed March 18, 1998 ("Amended Petition"), Appendix A (modifying proposed rule Section 73.627(a) to require that Class A applications be filed within one year after the effective date of the new rules). Pappas recognizes that the CBA's rulemaking proposal has been rendered moot, at least in large part, by the CBPA. Nevertheless, because the CBPA contains language which is substantially similar to that contained in the CBA's rulemaking petition, the Commission should consider certain aspects of the CBA's rulemaking proposal in promulgating rules to implement the CBPA and attempting to resolve matters which have not been specifically addressed in the new legislation.

[42] 47 U.S.C. §336(f)(2)(A). The CBPA describes local programming in the following manner:

> . . . programming that was produced within the market area served by such station, or the market area served by a group of commonly controlled low-power stations that carry common local programming produced within the market area served by such group . . . ."

(continued...)

As stated above, in the event the Commission elects to adopt its proposal to require pending NTSC proposals to protect Class A stations, including those which would promote the objectives of Section 307(b) of the Act by bringing the proposed community its first local television service, the Commission must demand strict adherence to both the minimum operating and local programming requirements. For example, assuming a Class A station broadcasts only 18 hours per day, the statutory requirement of airing an average of 3 hours per week of local programming amounts to approximately only 2.4% of a Class A station's total broadcast time. If a Class A station were to broadcast 24 hours per day (168 hours per week), the local programming requirement would constitute only 1.8% of the station's total programming. Because Congress has required that a Class A station's local programming consist of less than 2% of its total available broadcast time, the FCC should demand strict adherence to the three-hour local programming requirement, and not waive that requirement under any set of circumstances. The Commission also should require that a Class A station's local programming be non-repetitive and noncommercial in nature. In addition, the Commission should not permit public service announcements to count towards the three-hour local programming requirement.

Moreover, because the CBPA is based on Congress' explicit findings that qualified LPTV stations have "provided [programming] to their communities that would not otherwise be available,"[43] and that it would serve "the public interest to promote diversity in television programming such as that currently provided by low-power television stations to foreign

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[42](...continued)
47 U.S.C. §336(f)(2)(A)(i)(II).

[43] Section 5008(b)(1) of Pub. L. No. 106-113, 113 Stat. 1501 (1999).

communities,"[44] the Commission should require Class A stations to continue to meet the local programming requirement after the filing of their Class A application and throughout each license period thereafter. Class A licensees also should be required to certify annually to their compliance with the local programming requirement.

V. Class A Applications.

A. Class A Applications Generally.

The Commission's proposal to grant initial Class A status to qualified LPTV stations as a modification of a station's license should be adopted.[45] Class A applications should be limited, however, to converting the qualifying LPTV station's existing technical facilities to Class A status. They should not be permitted to propose any changes in the station's existing licensed LPTV facilities. In the event qualified LPTV stations hold a construction permit to modify their licensed facilities, they should not be entitled to file a Class A application for their modified facilities until they have constructed those facilities and filed a covering license application. Any Class A application for a qualified LPTV station's modified facilities should be required to contain a satisfactory showing demonstrating that the modified Class A facility will not cause interference to any other authorized or earlier-filed application for an NTSC, DTV, or land mobile facility.

B. Class A Modification Applications Should Be Required to Protect Full-Service Stations to Maximum Facilities.

Class A applications which seek a change in the station's facilities should be required to protect the maximum facilities of full-service stations. The Commission should not, however, apply

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[44] *Id.* at §5008(b)(5).

[45] *NPRM*, ¶42.

a reciprocal rule. The purpose of the CBPA is to protect qualifying LPTV stations as they existed at the time the new legislation was enacted, not to unnecessarily preclude or limit full-service TV stations (including DTV stations) from maximizing their facilities.[46] Therefore, the Commission should not require full-service NTSC or DTV stations to protect Class A stations to maximum facilities.

C. Class A Channel Displacement.

In the event it is necessary for a Class A station to change channels in order to eliminate an interference conflict, Class A stations should be permitted to apply for replacement channels on a first-come, first-serve basis, and not be subject to competing mutually exclusive applications. Moreover, Class A displacement applications should not be required to be filed during a filing window, and should not be considered mutually exclusive unless they are filed on the same day. Those mutually exclusive Class A applications which are filed on the same day should be subject to the auction procedures contained in Section 309(j) of the Act.

D. Class A Applications Should Be Subject to a Petition to Deny Filing Period.

Although the FCC has proposed to consider Class A applications as minor modification applications, the Commission should nevertheless subject Class A applications to a 30-day petition to deny filing period. Subjecting Class A applications to a meaningful period in which petitions to deny may be filed would help ensure that (i) Class A applicants have, in fact, satisfied the statutory eligibility criteria, including having operated their LPTV station in compliance with the Commission's rules, (ii) the proposed Class A station has neither caused nor will cause interference

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[46] *See, e.g.*, 47 U.S.C. §336(f)(1)(D).

to a full-service station, and (iii) a grant of the Class A application would otherwise serve the public interest.

VI. Conclusion.

In implementing the CBPA, the Commission should interpret Section 336(f)(7)(A) of the Communications Act as requiring Class A applications to protect all full-service analog stations, including pending applications for such facilities, many of which have been pending at the Commission for several years. Requiring Class A applications to protect pending applications for full-service stations would serve the public interest by promoting the Commission's fundamental objectives of fostering competition and creating additional opportunities for increased ownership diversity, which the new full-service stations would provide. Moreover, affording protection to pending full-service applications would promote the further development and emergence of new national networks because it would enable them to establish primary affiliations with the new full-power broadcast stations, and thereby enhance their distribution.

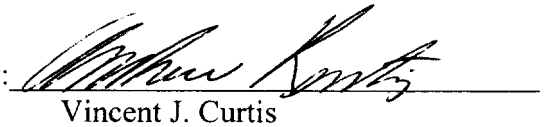
Interpreting Section 336(f)(7)(A) of the Act in the manner described above also would enable the Commission to avoid raising the significant constitutional question of whether the dismissal of certain auction winners' applications for full-power television stations, which may conflict with subsequently-filed Class A applications, would constitute an unlawful "taking" in violation of the Fifth Amendment. In addition, requiring Class A applications to protect pending full-service applications would prevent the gross inequity that would result from the disparate treatment that applications for full-power stations and LPTV and TV translator applications received during the DTV "freeze."

Furthermore, requiring Class A applications to protect pending full-service applications would avoid the inherently inconsistent and unintended result of (i) authorizing Class A stations without regard to pending applications for full-power television stations, which have always been entitled to primary service status; and (ii) requiring Class A applications to protect only pending applications for LPTV and TV translator stations, including those which are not eligible for a Class A license. Because many of the pending applications for full-service stations propose to bring a first local service to the designated community, a decision by the Commission not to protect these pending applications also would result in an inconsistency between Sections 336(f)(7)(A) and 307(b) of the Act.

The Commission should keep in mind that the primary purpose of the CBPA is to protect the existing authorized facilities of qualified LPTV stations and prevent any further displacement of those stations. The new legislation was not designed to completely overturn the Commission's longstanding regulatory scheme by effectively elevating all LPTV and TV translator stations -- including those which are not even qualified for a Class A license -- to a higher status than full-service stations, especially those which would promote the purposes of Section 307(b) of the Act by bringing a local first local television service to the proposed community. Therefore, in promulgating new rules to implement the CBPA, the Commission should adopt rules which are consistent with the Communications Act as a whole as well as the Commission's longstanding regulatory framework. Indeed, if the Commission elects to afford applications for LPTV and TV translator stations greater rights than those given to pending applicants for new full-service stations, the Commission's Report and Order in this proceeding undoubtedly will be challenged on appeal, and is not likely to survive judicial scrutiny.

Respectfully submitted,

PAPPAS TELECASTING COMPANIES

By: 

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CERTIFICATE OF SERVICE

I, Barbara Lyle, a secretary in the law firm of Fletcher, Heald & Hildreth, P.L.C., hereby certify that on this 10th day of February, 2000, copies of the foregoing "Comments of Pappas Telecasting Companies" were hand delivered to the following:

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